In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

No. 78-221

SIERRA TERRENO, a Limited Partnership, CAL-PACIFIC RESOURCES, INC., WALTER E. BLOOM, et al.,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
Third Appellate District

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Subject Index

Table of Authorities Cited

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INTRODUCTION

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate District, entered on March 15, 1978, in which a hearing was denied by the Supreme Court of the State of California on May 11, 1978.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Third Appellate District, is printed in Appendix A hereto and is reported at 79 Cal. App. 3d 439, 144 Cal. Rptr. 776.

JURISDICTION

The judgment printed in Appendix A hereto, which is sought to be reviewed, is dated March 15, 1978. A rehearing by the Court of Appeal, Third Appellate District, was denied on April 4, 1978. A hearing in the California Supreme Court was denied on May 11, 1978.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code.

QUESTIONS PRESENTED

Does the constitutional guarantee of just compensation for the taking of private property for public use allow petitioners a cause of action for such payment following the imposition of a zoning ordinance which deprives them of all reasonable use and enjoyment of their properties and which devotes such properties to public use?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

> . . .; nor shall private property be taken for public use, without just compensation.

This requirement applies to the states through the due process clause of Amendment XIV. *Foster v. City of Detroit,* 254 F. Supp. 655, aff. 405 F. 2d 138. California has recognized this effect. *City of Los Angeles v. Wolfe,* 6 C. 3d 326.

STATEMENT OF CASE

The Tahoe Regional Planning Agency is a separate legal entity created in 1969 by Congressional ratification of the compact between the States of California and Nevada. (Public Law 91-148, 83 Stats. 360). After the TRPA was given jurisdiction over the entire region it adopted the land use ordinance in question.

Petitioners own real property in the Tahoe area which, during petitioners' ownership, had previously been zoned, assessed and valued for industrial and commercial uses. The TRPA land use ordinance then reclassified petitioners' lands as "General Forest". Petitioners alleged that such classification allowed "no development whatsoever, except for minor improvements incident to outdoor recreation, and public and quasi-public uses, and with the exception that one single family residence could be built on a parcel of record."

Petitioners' Complaints alleged that such downzoning was motivated by the desire to devote the properties to public use, accomplished that purpose, and deprived appellants of all reasonable use, profit and enjoyment of their properties. It was also alleged

that TRPA has desired to acquire title or development rights to the properties, and the purpose of the down-zoning was to either reduce the value and forestall development of the properties pending acquisition or, if the properties could not be acquired, to nevertheless permanently devote them to public use. The exact amount of damages claimed was unascertained at the time of pleading and was left subject to later amendment. However, the complaints alleged: "By all of its said actions, defendant deprived plaintiffs of all reasonable use, profit and enjoyment of their property," and "Defendant's said actions had the immediate and continuing effect of depriving plaintiffs of substantially all the value of their properties. The value of said properties remaining after defendant's said actions was either nominal or no greater than 25% of the value of said properties before defendant's said actions." Finally, the complaints allege that the down-zoning itself constituted a "public project, the purpose of which was to either forestall or substantially decrease the amount of development which otherwise would have occurred in the Lake Tahoe Basin so as to devote the properties to general recreational scenic use to be enjoyed by the public at large." These were causes of action solely for just compensation as required by the constitutions of the State of California and the United States.

The Trial Court sustained demurrers without leave to amend and entered Judgment of Dismissal. Petitioners' appeal followed. Thus, this case came up at the initial pleading stage. The federal question de-

rived from the United States Constitution was raised in petitioners' Complaints which alleged:

> By all of its said actions, defendant deprived plaintiff of all reasonable use, profit and enjoyment of its property. Defendant has not offered just compensation for said taking and damaging of property, as it is required to do by the Constitutions of the State of California and the United States.

Thereafter, the United States Constitution, Fifth Amendment was cited in the appellate briefs.

REASONS FOR ALLOWANCE OF THE WRIT

A "taking" within the meaning of the constitutional guarantee can occur without a change in title or possession. *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393. This Court said in *Armstrong v. United States* (1960) 364 U.S. 40, 49, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole." And, again, in *United States v. Willow River Power Co.* (1945) 324 U.S. 499, 502, the Court said, "The Fifth Amendment undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."

Justice Holmes' famous admonition is as relevant today as when he stated it in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. at 416, that:

> In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. (Citations omitted.) We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

The nature of the public use for which the private property is taken or damaged has no bearing on the right of the owner to receive just compensation. Eminent domain proceedings are utilized not only for the acquisition of private property for highways and schools but also for "open-space" for public enjoyment. Thus, the plausible objectives of the Tahoe Regional Plan should have no more effect on the constitutional guarantee of just compensation than the benefits to be derived from a needed school or hospital.

It should follow that the *means* by which the public use is imposed should also have no bearing on the right of the owner to just compensation. For example, the State of California may deprive private property of access to public streets by the exercise of its power of eminent domain. *People v. Ricciardi* (1943) 23 C.2d 390. Where the State takes access without perfecting its right to do so, the owner has a cause of action in inverse condemnation. *Bacich v.*

Board of Control (1943) 23 C.2d 343, 352. Likewise, a State agency may acquire private property for "open-space" by the exercise of eminent domain. Cal. Govt. Code §§ 6953 and 51072. Where that particular public use is imposed by a zoning regulation, the owner's right to secure just compensation through an inverse action should be afforded no less dignity.

A zoning regulation may constitute the means by which a public use is imposed. In *Kissinger v. City of Los Angeles* (1958) 161 Cal. App. 2d 454, an unduly restrictive down-zoning was declared invalid upon the ground, among others, that "Said ordinance, if sustained, would constitute confiscation of plaintiff's property." (Page 455.) That down-zoning was from R-3 (multiple residential) to R-1 (single family residential). The alleged result was a diminution in value from $114,000 to $18,000. (Page 459.)

In *Sneed v. County of Riverside* (1963) 218 Cal. App. 2d 205, the Appellate Court reversed a judgment of dismissal after demurrers were sustained without leave to amend plaintiff's complaint seeking money damages in inverse condemnation resultant from a down-zoning ordinance. That case stands for the proposition that a cause of action in inverse condemnation may lie to recover money damages for an extremely restrictive zoning ordinance which damages private property for public use.

The police power and the power of eminent domain must be distinguished. Each has its source in the necessity of the government to act in the public

interest. However, the constitutional right to receive just compensation results only from an exercise of the power of eminent domain. Clearly, schools and parks are for the public good but one's property may not be taken for either purpose without compensation. If a parcel of property were zoned exclusively for park purposes or exclusively as a school playground, the purported regulation would, in fact, be an exercise in eminent domain. Distinguishing between the exercise of the two powers is not always easy. Which of the powers is being used does not necessarily appear from the form in which the community puts its action. Indeed, the entire concept of inverse condemnation arises from circumstances in which harsh regulation unduly invades private property.

Finally, this Court has recently granted certiorari in *Jacobson v. Tahoe Regional Planning Agency,* 558 F. 2d 928 and 556 F. 2d 1353. *Jacobson* presents issues similar to the present case, particularly in view of the fact that the "down-zoning" complained of by *Jacobson* was also to "general forest". Petitioners submit that certiorari should be granted them in order to allow their matter to be treated consistently with *Jacobson.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, August 4, 1978.

GARY R. RINEHART,
Counsel for Petitioners.

(Appendices Follow)

Appendices

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
Third Appellate District

[El Dorado]

3 Civil 16389

Sierra Terreno, a Limited Partnership, Plaintiff and Appellant, vs. Tahoe Regional Planning Agency, State of California and County of El Dorado, Defendants and Respondents.	(Sup. Ct. No. 22217)
Cal-Pacific Resources, Inc., Plaintiff and Appellant, vs. Tahoe Regional Planning Agency, State of California and County of El Dorado, Defendants and Respondents.	(Sup. Ct. No. 22218)
Walter E. Bloom, et al., Plaintiffs and Appellants, vs. Tahoe Regional Planning Agency, State of California and County of El Dorado, Defendants and Respondents.	(Sup. Ct. No. 22219)

[Filed Mar 15, 1978]

Opinion

(See Concurring Opinion)

Plaintiffs, Sierra Terreno, etc., Cal-Pacific Resources, Inc., and Walter E. Bloom, et al., brought separate actions for inverse condemnation against the Tahoe Regional Planning Agency ("TRPA"). Plaintiff owned real property situated in El Dorado County which previously had been zoned, assessed and valued for primarily industrial and commercial uses. The TRPA adopted a land use ordinance and reclassified plaintiffs lands as "general forest" and for other uses much more restrictive than those previously allowed.

Plaintiffs, in their complaints, claimed that the down-zoning by the TRPA reduced the value of their property thereby depriving them of all its reasonable use, profit, and enjoyment without just compensation in violation of the California Constitution (art. I, § 9). Plaintiffs sought damages solely under the theory of inverse condemnation. A judgment of dismissal was entered by the trial court after defendants' consolidated demurrers were sustained without leave to amend. Plaintiffs appeal.

We conclude that an action for inverse condemnation cannot be maintained.[1] Accordingly, we affirm.

* * * * *

[1]Neither can it be maintained against the county or state. By our resolution of the demurrer issue we need not face the ancillary issues raised by plaintiffs.

We are convinced that HFH, Ltd. v. Superior Court (1975) 15 Cal.3d 508, controls. There, the Court held that the mere diminution in value of property due to the rezoning of that property for less intensive uses does not give rise to an action in inverse condemnation. (See also, Pinheiro v. County of Marin (1976) 60 Cal.App.3d 323, at p. 325.)

The actions of TRPA are challenged. The TRPA was created by an interstate compact set forth in Government Code section 66801. Article VI of the compact is the provision which details the agency's powers. The TRPA was given the power to enact regulations which would effectuate the adopted regional plans for the Lake Tahoe Basin. The TRPA is empowered to regulate, among other things, the water purity and clarity, subdivision, and zoning of the region. The TRPA was not given the power to condemn property for public use (art. VI).

The challenge fails. The mere adoption of a general plan with areas designated for acquisition cannot give rise to a claim for inverse condemnation. (Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 119; Pinheiro v. County of Marin, supra, 60 Cal.App.3d at p. 325.) A party has no vested interest in a previous zoning classification of his property. (HFH, Ltd. v. Superior Court, supra, 15 Cal.3d, at p. 516; Pinheiro v. County of Marin, supra, 60 Cal.App.3d 323, at p. 325.) In this case the plaintiffs did not allege that any existing use of their land has been terminated by TRPA.

Plaintiffs allege on one hand that the actions of TRPA had deprived them of all reasonable use, profit and enjoyment of their properties; on the other hand, they concede in the pleadings that some value remained in the properties.[2]

The complaints stated that the remaining value was either nominal or no more than 25% of the former value. The plaintiffs did not allege that no value remained. At the hearing on the demurrer, counsel for the plaintiffs stated that the proof, as he then knew it, was that about 25% of the value remained.

Thus, we again see the similarity to *HFH*. There plaintiff had alleged that no reasonably beneficial use remained. It conceded that a value of $75,000.00 remained in the property (from the original $400,000.00). The Supreme Court held that the concession that value remained rebutted the allegation that there was no use for the property. (HFH, Ltd. v. Superior Court, supra, 15 Cal.3d at p. 512, fn. 2.) The Court further noted that the plaintiff did not allege that the property was not suited to be used for a purpose for which it had been rezoned. (*Ibid.*)

Zoning and rezoning present perplexing problems of economic and environmental gain and loss. While some gain others lose. It is the Legislature which must strike the proper balance. Within the limits set by *HFH* the courts will exercise their duty to protect

[2]These concessions bely the emphasis in plaintiff's brief that we deal with a taking of substantially all use, an issue left open by HFH, Ltd. v. Superior Court, supra, 15 Cal.3d 508.

the individual from improper governmental taking of or damage to property.

The judgment is affirmed.

Reynoso, J.

I concur:

Friedman, J.*

I concur under the compulsion of the majority opinion in HFH, Ltd. v. Superior Court (1975) 15 Cal.3d 508. I am constrained however to voice my agreement with the rationale expressed in the dissent by Justice Clark.

Evans, Acting P.J.

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Appendix B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

May 11, 1978

I have this day filed Order

Hearing Denied

In re: 3 Civ. No. 16389

Terreno

vs.

Tahoe Regional Planning Agency

Respectfully,
G. E. Bishel
Clerk

In the Supreme Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES CITED

CASES

Constitution

Statute

Ordinance

Miscellaneous

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

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Third Appellate District

OPINION BELOW

The state court opinion is adequately referenced in the Petition.

JURISDICTION

The jurisdictional statement in the Petition is accurate.

QUESTION PRESENTED

Does the Fifth Amendment of the United States Constitution require that TRPA pay damages for the deprecia-

tion in value suffered on Petitioners' 454 unimproved lots, which damages allegedly were caused by TRPA's zoning the lots Low Density Residential and General Forest, permitting four dwelling units per acre and one dwelling unit per lot, respectively, and which uses are less intense than those permitted under prior El Dorado County zoning?

STATUTES INVOLVED

The Petition adequately references the pertinent constitutional provisions, with the exception of the Compact clause (Article I, § 10, Cl. 3 of the Constitution of the United States). Further, the Petition omits reference to the Tahoe Regional Planning Compact (Public Law No. 91-148, 83 Stat. 360).

STATEMENT OF THE CASE

Petitioners own 454 unimproved lots within the Lake Tahoe Region. Such lots were zoned by El Dorado County for residential, multi-family residential, industrial and commercial uses.

TRPA was created by Congressional ratification of a proposed compact between the States of California and Nevada [Act of December 18, 1969, Public Law 91-148, 83 Stat. 360]. The Compact invests TRPA with jurisdiction over the watershed area of the Lake Tahoe Basin, the area in which petitioners' lots are situate [Article II(a) Compact]. TRPA has no authority to own or condemn property, has never owned any property, and has never sought to acquire any property.

Pursuant to Compact requirements, TRPA adopted a *Land Use Ordinance* zoning all property within the Region,

including petitioners' [Article VI Compact]. That ordinance classifies petitioners' lots for uses less intensive than those allowed by El Dorado County's prior zoning.

Some of petitioners' lots are designated Low Density Residential by TRPA. TRPA's Low Density Residential classification permits single family dwelling units up to four (4) dwelling units per acre and numerous non-residential uses.

Some of petitioners' lots are designated General Forest by TRPA. TRPA's General Forest classification permits a single-family residence on each lot, resource extraction, skiing facilities, privately owned campgrounds and other uses.

At the time of El Dorado County zoning of petitioners' lots, a freeway had been planned by the State of California in close proximity to the lots. Such freeway proposal has since been abandoned by the State of California.

Contending that the abandonment of the proposed freeway and TRPA's zoning of their lots for less intense uses had depreciated the value of their land, petitioners filed three separate actions in the Superior Court of the State of California in and for the County of El Dorado. Defendants were TRPA, El Dorado County and the State of California.

The complaints sought to recoup the difference in value between El Dorado County's land use classifications with a freeway in close proximity and the lesser value under TRPA's classifications with no freeway. The alleged difference in value is 75%. Petitioners contend that only 25% remains of the value their lots enjoyed under the prior

zoning of El Dorado County. Petitioners expressly disclaimed declaratory, injunctive or other relief in the nature of mandamus; petitioners limited themselves to damages.

After numerous complaint amendments, demurrers on behalf of all defendants were sustained by the trial court in all three cases without leave to amend. During the pendency of petitioners' state court appeal, the state and county were voluntarily dismissed. Subsequent to affirmance of the trial court judgment and denial of hearing by the California Supreme Court, this petition was filed.

REASONS FOR DENIAL OF THE WRIT

1. The Question Framed by the Petition Is Not Presented on this Record. A Single-Family Residence on Each of Petitioners' 454 Lots Is Not "No Use".

The petition frames the intellectually fascinating question of whether the Fifth Amendment constitutionally requires just compensation for a governmental act depriving a party of all feasible use of his property. Compelling public interests have been held to justify even such restrictive regulations. *Miller v. Schoene,* 276 U.S. 272 (1928), upheld the uncompensated destruction of cedar trees by governmental order when such "ornamental" trees posed a threat of infestation to nearby agricultural crops; *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), upheld a prohibition on a brickyard business as incompatible with nearby uses despite nearly a 90% depreciation in property value; and *Goldblatt v. City of Hempstead,* 369 U.S. 590 (1962), upheld a governmental prohibition on excavations below water table which effectively eliminated the only economically feasible use of property.

Relying on the foregoing authority, TRPA could cogently urge that the Compact's legislative history and findings, articulating the need for more stringent land use and environmental controls,[1] afford the compelling governmental interest for such "no use" regulations. Indeed, the governmental interests articulated by the Compact and its legislative history appear more compelling than those recognized in the foregoing authority.

There is, however, no need to reach the intellectually interesting, but, for purposes of this case, academic, question of whether monetary relief would be appropriate under the Fifth Amendment against TRPA if it should adopt regulations denying substantially all use of property. Petitioners' own complaints herein admit that even on the most restrictively zoned lots a single-family residence is permitted. A single-family residence on each of 454 subdivided lots is hardly no use.

2. The Record Herein Presents no More Than an Attempt to Recover the Difference in Value Between Use Classifications. This Case Involves Neither the Direct Frustration of Distinct Investment-Backed Expectations Nor Governmental Proprietary Functions "Interfering" with the Use of Petitioner's Property.

Petitioners seek relief squarely barred by a long line of decisions of this court culminating in *Penn Central Transportation Co. v. New York City,* ..... U.S. ....., 46 Law Week 4952, Opinion No. 77-444 (June, 1978).

---

[1]See Compact, Article I. The legislative history in question is contained at 115 Cong. Rec. 33068-33069 and is quoted at length in footnotes 1, 2, 3 and 16 of *Younger v. County of El Dorado,* 5 Cal. 3d 480, 487 P. 2nd 1193 (1971).

Petitioners essentially seek as Fifth Amendment "damages" the difference in value between two land use classifications. As in *Penn Central,* petitioners do not dispute the governmental goals underlying TRPA's zoning nor do they dispute that the zoning so imposed is an appropriate means of securing those goals.[2] Instead, petitioners seek the value they believe they would have realized had they exploited their lots in a manner that they once perceived as being possible.

This court has frequently rejected such claims.

> "By its nature, zoning 'interferes significantly with owners' uses of property. It is hornbook law that '[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance . . .'."
>
> *Eastlake v. Forest City Enterprises,* 426 U.S. 668, 674 n. 8 (1976).

> ". . . (T)he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."
>
> *Penn Central Transportation Co. v. New York City, supra,* Slip Opinion at page 24.

[2]Petitioner's do, indeed, seek to parse the motivations of TRPA in adopting its comprehensive *Land Use Ordinance.* Such hypothesizing, aside from being belied by the specific provisions of the Compact, (i.e., the absence of condemnation authority), is not even a proper subject of judicial inquiry. *United States v. O'Brien,* 391 U.S. 367, 383-386 (1968) and *Arizona v. California,* 283 U.S. 423, 455 (1931).

Diminution in value as a result of governmental regulation, such as the 75% diminution urged by petitioners, simply is not an *ipse dixit* test of "taking".

> "(T)he decisions sustaining other land use regulations, which, like the New York law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a taking, see *Euclid v. Ambler Realty Co., supra* (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian, supra* (87½% diminution in value). . . ."
>
> *Penn Central Transportation Co. v. New York City, supra,* Slip Opinion at page 25.

The circumstances which have been judicially recognized as justifying compensation pursuant to the Fifth Amendment have been aptly characterized as the undue direct frustration of investment-backed expectations or governmental proprietary activities which distinctly affect recognized real property interests. *Id.* Slip Opinion, pages 18-19. Neither exists herein.

Petitioners' expectations that their properties would appreciate in value by favorable zoning are hardly the contractually reserved rights to mine coal recognized in *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922). Unless the Fifth Amendment constitutionally requires compensation *whenever* zoning is imposed or changed, petitioners' expectations are precisely the same as those found not entitled to Fifth Amendment compensation in *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) and *Penn Central Transportation Co. v. New York City, supra.*

Nor have petitioners suffered direct interference by a uniquely governmental function. Neither a proprietary governmental invasion of petitioners' lots, e.g., *Causby v. United States,* 328 U.S. 256 (1946), nor the physical damage caused by governmental police functions is alleged to exist herein. See, e.g., *YMCA v. United States,* 395 U.S. 85 (1969).[3]

Nor do petitioners offer any other considerations which would remove this case from the familiar principle that comprehensive land use measures will not be proscribed on Fifth Amendment grounds merely because they economically burden some properties more than others. The very authority relied upon in the petition states the apposite rule:

> "[The Fifth Amendment] does not undertake, however, to socialize all losses, but those only which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision."
>
> *United States v. Willow River Power Company,* 324 U.S. 499, 502 (1945).

[3]The petition urges that petitioners' 454 lots have been "devoted" to a "public use" of open-space, perhaps suggesting that petitioners complain of a governmental proprietary action. Such characterizations should not mislead. Petitioners ability to develop a dwelling unit per lot on their General Forest lands and four dwelling units per acre on their Low Density Residential lands remains. To be sure, since such zoning is less intense than formerly permitted by El Dorado County, the portion of the lots not occupied by the dwelling unit can be characterized as "devoted to open space" to the degree that such area would have been occupied by the industrial structures contemplated by petitioners. Such area "devoted to open space" is, however, no different than the: (i) "open areas" to be left unbuilt upheld in *Gorieb v. Fox* 274 U.S. 603 (1927); (ii) "open area" proscribed by the height limit sustained in *Welch v. Swasey,* 214 U.S. 91 (1909); or (iii) "open area" above Penn Central Station sustained as part of New York City's Landmark Preservation law in *Penn Central, supra.* Any regulation which lessens the intensity of permitted development is subject to the characterization that the decrement in intensity is to that extent "devoted to open space". Such characterizations manifestly do not shape Fifth Amendment jurisprudence nor may a pleader so facilely raise Fifth Amendment claims.

No elements appearing excepting this case from customary principles that the Fifth Amendment does not socialize all loss resulting from uniform police power regulations, certiorari is appropriately denied.

3. No Similarity of Issues Exists Between This Case and the Case Presently Before This Court to Which TRPA Is a Party.

As is apparent from the opinion below [Appendix], the lower court relied extensively on the opinion of the California Supreme Court in *HFH, Ltd. v. Superior Court,* 15 Cal. 3d 508 (1975), *cert. den.* 425 U.S. 904. There, the California Supreme Court held inverse condemnation an inappropriate remedy for the downzoning of property from commercial to very low density residential. The alleged devaluating effect of such zoning was in excess of 80%. The identity of such facts with those presented by the complaints herein is manifest. With such identity of fact both the District Court of Appeals and the California Supreme Court (the latter by denying hearing) appropriately found inverse condemnation does not lie herein.

Petitioners attempt to overturn the settled result of *HFH* by urging this court to grant certiorari based upon this court having recently granted certiorari in a separate case. Petitioners' miscitation of the case presently before

this court is indicative of petitioners' misconception of the issues therein before this court.

To be sure, *Lake Country Estates v. TRPA,* No. 77-1327 is presently before the court. The issues therein bear no resemblance to those proffered by this petition. The issues tendered in *Lake Country* are three: (i) the amenability of TRPA to suit in federal court in view of the Eleventh Amendment (and a related contention of waiver of such immunity); (ii) the scope of immunity of individual TRPA Governing Body members for their acts; and (iii) whether *Bivens v. Six Unknown Agents,* 403 U.S. 388 (1971), insofar as it affords a "constitutional tort" remedy, is appropriately extended to claims against Governing Body members.

Other than the fact that TRPA is a party in each case, the two cases are entirely distinct and the pendency of one case before this court does not indicate the other should be here.

CONCLUSION

". . . [M]ere diminution of market value or interference with property owners' personal plans and desires relative to its property is insufficient to invalidate a zoning ordinance . . .", *Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 674 n. 8 (1976). It was based on this fundamental principle that the state court held for respondent below. It is based on this fundamental principle that certiorari is appropriately denied.

Dated September ....., 1978.

Respectfully submitted,

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